Supreme Court, U.S.
FILED
MAY 21 2001
OFFICE OF THE CLERK

No. 00-1464

IN THE

Supreme Court of the United States

PHELPS DODGE CORPORATION and
ARIZONA PUBLIC SERVICE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF IN OPPOSITION FOR RESPONDENTS THE SAN CARLOS APACHE TRIBE, THE TONTO APACHE TRIBE, AND THE YAVAPAI-APACHE NATION

JOE P. SPARKS
Counsel of Record
JOHN H. RYLEY
SPARKS, TEHAN & RYLEY, P.C.
Attorneys for Respondents
The San Carlos Apache Tribe,
The Tonto Apache Tribe, and
The Yavapai-Apache Nation
7503 First Street
Scottsdale, Arizona 85251
(480) 949-1339

167161

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Parties to this Brief in Opposition 1

A. The San Carlos Apache Tribe. 1

B. Tonto Apache Tribe. 2

C. Yavapai-Apache Nation. 3

Statement of the Case 4

Summary of Argument 6

Argument 7

Reasons for Denying the Writ 12

A. The Court Lacks Jurisdiction. 12

1. 28 U.S.C. § 1257(a) Does Not Authorize the Jurisdiction of This Court. 12

a. No State Law is Questioned by the Petition for Writ of Certiorari. ... 12

2. The Question Presented Is Not Ripe For Adjudication. 13

3. No Constitutional Takings Question is Presented. 15

4. No Compelling Reason Exists for Granting the Petition for Writ of Certiorari. 16

Contents

Page

B. The Previous Decisions of Arizona Courts Regarding Subflow Conform with the Decision of the Arizona Supreme Court *Gila River IV* and Do Not Constitute a Sudden Change in Arizona Law. 17

C. The Holding in *Gila River IV* Does Not Destroy Vested Property Rights to Groundwater Because the Potential, Future Use of Groundwater is Not a Vested Property Right Under Arizona Law. 23

D. The Decision in *Gila IV* Does Not Infringe on Any Groundwater Right, It Merely Requires the Adjudication of Appropriable Subflow. 28

Conclusion 30

TABLE OF CITED AUTHORITIES

Cases: *Page*

Arizona v. California, 283 U.S. 423 (1931) 4

Arizona v. California, 376 U.S. 340, 11 L. Ed. 2d 757, 84 S. Ct. 755 (1964) 8

Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983) 5, 6, 7, 9, 10, 11, 30

Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953) 24, 25, 26

Cappaert v. United States, 426 U.S. 128, 48 L. Ed. 2d 523, 96 S. Ct. 2062 (1976) 8

Cherry v. Steiner, 543 F. Supp. at 1277 (1982) 27

Cherry v. Steiner, 716 F.2d 687 (1983) 27

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 10

Cortaro Water Users' Association v. Steiner, 148 Ariz. 314, 714 P.2d 807 (1986) 23, 24

Globe Equity No. 59, 920 F. Supp. 1444 (D. Ariz. 1996) 5

Howard v. Perrin, 200 U.S. 71, 26 S. Ct. 195 (1906) 17

Howard v. Perrin, 8 Ariz. 347, 76 P.2d 460 (1905) 25

Cited Authorities

Page

In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 175 Ariz. 382, 857 P.2d 1236 (1993) 5, 6, 7, 9, 21, 22

In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 195 Ariz. 411, 989 P.2d 739 (Ariz. 1999), *cert. denied*, 530 U.S. 1250, 120 S. Ct. 2705 (2000) 5, 7, 9, 28

In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 198 Ariz. 330, 9 P.3d 1069 (2000) ..... *passim*

International Longshoreman's & Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222 (1954) .. 13

In the Matter of the Rights to the Use of the Gila River, 171 Ariz. 230, 830 P.2d 442 (1992) 4, 5, 7, 10, 17, 25

Johnson v. Frankell, 520 U.S. 911, 117 S. Ct. 1800, 138 L. Ed. 2d 108 (1997) 28

Kansas v. Colorado, 514 U.S. 673, 115 S. Ct. 1733, 131 L. Ed. 2d 759 (1995) 8

Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978) 28

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886 (1992) 29

Cited Authorities

	Page
Maricopa County Municipal Water Conservation Dist. No. One v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (Ariz. 1931)	*passim*
Minnick v. California Department of Corrections, 452 U.S. 105 (1981)	15
Moses H. Cone Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983)	10
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)	1
Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983)	13
Pima Farms Co. v. Proctor, 30 Ariz. 96, 245 Pac. 369	17
Poulos v. New Hampshire, 345 U.S. 395, 73 S. Ct. 760, 97 L. Ed. 1105 (1953)	28
Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967)	28
Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947)	15
Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977)	13, 14
Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985)	13

Cited Authorities

Page

Robinson v. Ariyoshi, 477 U.S. 902, 106 S. Ct. 3269 (1986) 14

San Carlos Apache Tribe et al. v. Superior Court of Arizona, 193 Ariz. 195, 972 P.2d 179 (1999) 10, 29

Texas v. New Mexico, 462 U.S. 554, 103 S. Ct. 2558, 77 L. Ed. 2d 1 (1983) 8

Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 638 P.2d 1324 (1981) 16, 17, 23, 24, 27

Town of Chino Valley v. State Land Dept., 119 Ariz. 243, 580 P.2d 704 (1978) 24

United States v. J. Ed Smith, 625 F.2d 278 (9th Cir. 1980) 9

United States v. Santa Fe Pacific Railroad Co., 315 U.S. 339 (1941) 1

United States v. Superior Court, 697 P.2d 658 (1985) 5

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 14, 15

Cited Authorities

Page

United States Constitution:

Fifth Amendment 15, 16

Statutes:

25 U.S.C. § 461, *et seq.* 1

28 U.S.C. § 1257(a) 12, 15

43 U.S.C. § 666 10

A.R.S. § 45-141, *et seq.* 6, 11

A.R.S. § 45-141.A 13

A.R.S. § 45-411, *et seq.* 26

A.R.S. § 45-461, *et seq.* 26

Rule:

United States Supreme Court Rule 10 16

United States Supreme Court Rule 10(c) 16

Page

Other Authorities

Arizona, art. 17, § 1 23

The Treaty of Guadalupe Hidalgo, 9 Stat. 922, Feb. 2, 1848 1

Restatement of Law of Torts, Volume IV, Chapter 41, Topic 4, Page 387, Section 860 24

P.L. 92-470, 86 Stat. 783, October 6, 1972 2

PARTIES TO THIS BRIEF IN OPPOSITION

Respondents, San Carlos Apache Tribe, Tonto Apache Tribe and Yavapai-Apache Nation ("Apache Tribes") are parties in "In Re The General Adjudication Of All Rights To Use Water In The Gila River System And Source," Consolidated Case Nos. W1-4.

The Apache Tribes are federally recognized pursuant to the Apache Treaty, July 1, 1852, 10 Stat. 979, and Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq*. The Reservations of the Tribes are all within their original aboriginal homelands under the Apache Treaty. *See United States v. Santa Fe Pacific Railroad Co.*, 315 U.S. 339 (1941); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983). *The Treaty of Guadalupe Hidalgo*, 9 Stat. 922, Feb. 2, 1848, the Apache Tribes were to be free and secure in their tribal homelands. *See*, Articles VIII, IX, XI, XXII.2.

A. The San Carlos Apache Tribe.

The San Carlos Apache Reservation ("the Reservation") was established by Executive Orders of President Grant on November 9, 1871, and December 14, 1872. There are approximately two thousand eight hundred and fifty-five (2,855) square miles within the current Reservation approximately (1,827,200 acres). The United States holds title to the lands within the Reservation in trust for the benefit of the San Carlos Apache Tribe. The Reservation is in Gila, Graham, and Pinal Counties in eastern Arizona. Tribal membership is approximately 12,000.

The Reservation is in the Upper Salt River, the Upper Gila River, and the San Pedro River "subwatersheds" of the Arizona General Stream Adjudication W-1 through W-4. Most major surface streams in central Arizona run through,

border, arise on, or are tributary to surface and underground water on the Reservation, including without limitation, the Black River, Salt River, the Gila River, Ash Creek, Willow Creek, Eagle Creek, Bonita Creek, Deer Creek, Salt Creek, and San Pedro River.

The San Carlos Apache Reservation is surrounded on three sides by federal land administered by the National Forest and Bureau of Land Management. The north boundary of the San Carlos Apache Reservation is the south boundary of the White Mountain Apache Reservation. The San Carlos and White Mountain Apache Reservations were once one, but later divided along the Black and Salt Rivers into the two separate Reservations which exist today.

The Gila River is the only stream with a Decree (Globe Equity No. 59) which purports to adjudicate certain rights on the San Carlos Reservation. That Decree provides only 6,000 acre-feet of water for 1,000 acres of irrigation along the Gila River in the San Carlos Apache Reservation, with a priority date of 1846. All residential, governmental, and commercial water use on the Reservation is from underground wells. There is no present substantial surface water use or development on the Reservation, with the exception of stockwatering, wildlife, and recreation.

B. Tonto Apache Tribe.

The Tonto Apache Tribe is a federally recognized Indian Tribe pursuant to P.L. 92-470, 86 Stat. 783, October 6, 1972. The Tonto Apache Tribe consists of over 100 members located on the Reservation of the Tribe which is 85 acres located south of Payson, Arizona in Gila County. One-half of the Reservation is in the upper Salt sub-watershed and one-half of the Reservation is in the upper east Verde sub-watershed of the Arizona General Stream Adjudication W-1 through W-4.

The Tonto Apache Reservation is surrounded on three sides by the Tonto National Forest and on the north by the Town of Payson. The Reservation has no surface water supply. The Tribe relies upon groundwater from a well which was developed by the United States to serve the Reservation. The parcel of land where the Tribal well is located was later traded into private ownership by the National Forest. To protect the Tribal water supply, federal deed restrictions were placed on the patent of property by the United States which prohibits the private owner from polluting the groundwater and from withdrawing groundwater from the land around the well site. Nearby pumping has reduced the production of the federal well which is now inadequate to meet the present needs of the Tonto Apache Reservation.

C. Yavapai-Apache Nation.

A Reservation was established by Executive Order on October 3, 1871, ten miles on both sides of the Verde River for forty-five miles, which Reservation was to serve as a permanent tribal homeland for both Tribes "as long as the grass shall grow and the stream shall flow." The Yavapai-Apache Nation has approximately 2,000 members.

In the late winter of 1875, both Tribes were forcibly removed from the Verde Valley in the "Trail of Tears." On April 23, 1875, the Reservation was terminated by Executive Order. Tribal members were forced through the snow nearly 180 miles to the San Carlos Reservation where they were incarcerated. Many men, women, and children perished on the way. Some escaped on route and returned to the Verde Valley. The remaining survivors walked back from San Carlos to the Verde Valley beginning In 1886. Many arrived after the start of construction of Roosevelt Dam at the confluence of the Salt River and Tonto Creeks In 1909. They were permitted to leave San Carlos to work on the Dam, and then returned home to the Verde Valley.

When the Tribes returned from San Carlos, either by escape or permission, they found their homes, farms and communities occupied or dominated by non-Indians. Nevertheless, the Tribal members persisted and established new camp and farm sites. Over a period of years a number of parcels of land occupied by Tribal members were acquired in trust either by the United States by statute, gift or exchange.

The Yavapai-Apache Reservation consists of several parcels of land totaling approximately 653 acres located In the Valley of the Verde River, Yavapai County, Arizona. Reservation parcels of land are located near Clarkdale, near Camp Verde, near Middle Verde, near Rimrock and at the I-17 interchange for the Montezuma Castle National Monument. Each parcel has a different acquisition date ranging from 1909 to 1974.

The Nation relies upon surface water from the Verde River for irrigation. It is totally dependent upon groundwater for all domestic, municipal and commercial purposes. Both surface water and groundwater are declining in the Verde Valley as a direct result of groundwater pumping in the Big Chino Valley, the Little Chino Valley near Prescott, Arizona, and pumping in the Verde Valley.

STATEMENT OF THE CASE

Arizona represented to the Court that all of the waters of the Gila River had been appropriated within the state prior to 1931. *Arizona v. California*, 283 U.S. 423, 462-3 n.14 (1931). "The Gila River System is over appropriated; the supply of water presently available and which seems likely to be available in the future is not sufficient to satisfy the needs and demands of existing projects." *Arizona v. California*, Report of the Special Master, December 5, 1960, p. 325; *see also In the Matter of the Rights to the Use of the Gila River*,

171 Ariz. 230, 232, 830 P.2d 442 (1992) ("*Gila River I*"), and *Globe Equity No. 59*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996) ("*Globe Equity*").

The Gila River General Stream Adjudication began as an administrative proceeding in 1974 when Salt River Project filed a petition with the Arizona Land Department to determine the conflicting rights in the Salt River above Granite Reef Dam. In its present form the Gila River adjudication is a consolidated effort to achieve "a comprehensive general stream adjudication to determine 'the nature, extent and relative priority' of the water rights of all who use the water of a 'river system and source' . . . " with respect to waters within the Upper Salt, Verde, Upper Gila, Lower Gila, Agua Fria, Upper Santa Cruz and San Pedro watersheds. *See In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411, 989 P.2d 739, 742 (Ariz. 1999) ("*Gila River III*").

In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 198 Ariz. 330, 9 P.3d 1069 (2000) ("*Gila River IV*") is the fourth case decided by the Arizona Supreme Court in Arizona's general stream adjudications within the context of six special interlocutory issues certified for review by the Arizona Supreme Court.[1]

---

1. *In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 171 Ariz. 230, 830 P.2d 442 (1992) ("*Gila River I*"); *In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 857 P.2d 1236 (1993) ("*Gila River II*"); *Gila River III*; *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983); and *United States v. Superior Court*, 697 P.2d 658 (1985). *See* Appendix to Petitions, Appendix D, pp. D1 and D2, the Arizona Supreme Court's "Orders Concerning Petitions for Interlocutory Review" filed December 11, 1990, which designated the six Interlocutory Issues for review by the Arizona Supreme Court, including Interlocutory Issue Two decided in *Gila River IV*; and the Arizona Supreme Court's "Special Procedural Order Providing for Interlocutory Appeals and Certifications" dated September 26, 1989, Phelps Dodge Petition, Appendix E.

Petitioners have requested the Court to review the effect of Interlocutory Issue Two as decided in *Gila River IV*.[2]

SUMMARY OF ARGUMENT

Gila River IV follows the Court's decision in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983) ("*San Carlos*"), where the Court decided, *inter alia*, that the McCarran Amendment provides state courts with jurisdiction to adjudicate Indian water rights in "comprehensive general stream adjudications".

The Court has observed the hydrologic reality that pumping of underground water sources ("subflow") can deplete surface water, as the Arizona court did in *In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 857 P.2d 1236 (1993) ("*Gila River II*"). *See San Carlos*. Therefore, those who claim the right to pump from underground water sources, which may interfere with federal reserved water rights or state water rights of prior appropriation, must be included in a "comprehensive" adjudication of all water rights *inter sese* in the Arizona General Stream Adjudication.

Gila River IV is a decision concerning state water law and property rights to water by the highest court in Arizona, over which the Arizona Supreme Court has "binding authority". *See San Carlos* at 561.

The Petitioners present a question which is abstract in nature. They present no case or controversy. They seek an advisory opinion from the Court. No water rights have been decided in the Arizona general stream adjudication. Thus, no decision has been made by an Arizona court which presents a factual predicate for review. The status of water rights in Arizona

---

2. Interlocutory Issue Two relates to what underground water is "appropriable" under A.R.S. § 45-141. *See* Petition, Appendix D.

has been established through the Arizona courts. No sudden change has occurred in that status.

Over the years the Arizona courts have more carefully defined that status. Technical advances have enabled the Arizona courts to determine the meaning of subflow from a reliable scientific standpoint. Before the advent of this kind of technology, surface appropriators rarely could meet their burden of proof in showing that pumping from underground water sources was depleting the in-stream flows. Now, however, surface water appropriators have the technology to prove the elements of the holding in *Maricopa County Municipal Water Conservation Dist. No. One v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369, 377 (Ariz. 1931) ("*Southwest Cotton*"). They should be permitted to do so.

ARGUMENT

The Apache Tribes[3] respond to the Petition filed by Phelps Dodge and Arizona Public Service Company.[4]

Eighteen years after the Apache Tribes were before this Court in *San Carlos*, not a single water right has been

---

3. Undersigned counsel has represented the Apache Tribes since 1974 in these matters and was designated by the Arizona Supreme Court as lead counsel to represent Arizona Indian tribes in *Gila River II*. *See* also *Gila River I* (Interlocutory Issue 1) (trial court procedures approved, including service by mail); *and Gila River III* (Interlocutory Issues 4 and 5), *cert. denied*, 530 U.S. 1250, 120 S. Ct. 2705 (2000).

4. *See* Petitions for Writ of Certiorari filed by, *Phelps Dodge Corporation, et al. ("Phelps Dodge) v. United States, et al., No. 99-1388; and Phelps Dodge, et al. v. United States, et al.*, No. 00-1464. Phelps Dodge and the Arizona Public Service Company ("*APS*") petition seeks review by this Court of Interlocutory Issue Two decided by the Arizona Supreme Court regarding the characterization of appropriable underground water "subflow" by that court.

adjudicated in the Arizona stream adjudication, and none are threatened to be adjudicated in the foreseeable future.[5]

The Apache Tribes appeared and have faithfully participated in the Arizona proceedings. *See San Carlos* at 545 n.17. As instructed by the Court in *San Carlos*, the Arizona courts have thus far honored the "solemn obligation to follow federal law." *Id.* at 571.

The Court has long recognized that pumping from "underground water sources" can "materially" deplete "usable" stream flow, *Kansas v. Colorado*, 514 U.S. 673; 115 S. Ct. 1733; 131 L. Ed. 2d 759 (1995) ("*Kansas v. Colorado*"), and other surface water supplies *Cappaert v. United States*, 426 U.S. 128, 48 L. Ed. 2d 523, 96 S. Ct. 2062 (1976) ("*Cappaert*"), sometimes at great distances.[6] *See also Arizona v. California*, 376 U.S. 340, 347-349, 350, 11 L. Ed. 2d 757, 84 S. Ct. 755 (1964) ("the Gila River and its underground water sources").

In *Cappaert* this Court found that ". . . the evidence showed the [g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." *Id.* at 142. On the Pecos River, the Court observed that "If development in New Mexico were not restricted, especially the ground water pumping near Roswell, no water at all might reach Texas in many years." *Texas v. New Mexico*, 462 U.S. 554, 557, 103 S. Ct. 2558, 77 L. Ed. 2d 1 (1983).[7]

---

5. Moreover, there has been no adjudication of any federal or state water rights in Arizona at anytime during the last 27 years, since the first general stream adjudication proceeding was initiated in 1974.

6. "2 ½ miles from Devils Hole", *Cappaert* at 426 U.S. 128, 133, approximately 205 miles "Pueblo, Colorado to Garden City, Kansas" *Kansas v. Colorado* at 677.

7. *Id.* at 557 n.2 "The nonflood "base" flow of the Pecos below Alamogordo Dam is supplied to a large part by groundwater aquifers

(Cont'd)

The Arizona Supreme Court ruled that the adjudication of the "Gila River and its sources" included its "underground water sources." *See San Carlos*. Petitioners contest the holding of Arizona's highest court, which has recognized this hydrologic connection under Arizona state law. The Arizona decision which requires those who pump from the underground water sources of the Gila River, classified as "subflow", to participate in the *inter sese* adjudication of their claims in the Arizona general stream adjudication.

Petitioners argue here that the Supreme Court of Arizona has created a new definition of "subflow" as it applies to Arizona's system of prior appropriation, and that the decision constitutes a "sudden and unpredictable" definition and results in a taking of vested property rights to groundwater. As argued in Point C, *infra*, there is no vested property right to groundwater under Arizona law.

Arizona's groundwater law already defies hydrological reality. *See United States v. J. Ed Smith*, 625 F.2d 278, 280 (9th Cir. 1980) at n.3. It is based upon an "artifice . . . that rests on a hydrologic misconception." *Gila River III* at 743. The Arizona Supreme Court observed that "conforming their law to hydrological reality, most prior appropriation jurisdictions by now have abandoned the bifurcated treatment of ground and surface water supplies." *Id* at 744. Arizona has not. *See also Gila River II*, 857 P.2d at 1240.

The Arizona Supreme Court by choice has not abandoned this bifurcated system largely due to the fact that the system

---

(Cont'd)
that empty into the river in the reach between Acme and Artesia, N.M. The operation of these aquifers is little understood. They are depleted by pumping from wells in the Roswell area, and there is some suggestion that at times heavy groundwater pumping in the area around Roswell may actually reverse the direction of flow of the underground aquifer, so that water flows away from the river."

defining subflow as part of an appropriable stream "serves to protect appropriable surface water rights against interference caused by the pumping of groundwater". *See Gila River IV* at 1073-4 (2000). Surface water "prior appropriation" rights are the foundation of both agricultural and municipal development in Arizona. Appropriated water is a vested property right in Arizona, whereas groundwater pumping of "percolating" water is not.[8] Respondents are aware of no cases which would allow a person to defeat a "prior appropriation" right by merely drilling a well.

The Arizona Supreme Court ruling contested by Phelps Dodge and APS requires pumpers of underground water of the Gila River to participate in the adjudication as is necessary to avoid piecemeal adjudication.[9] At this point in the Arizona proceedings, the holdings of the Arizona Supreme Court merely assure that the state groundwater pumpers are on notice and are participating in the adjudication as is necessary to preserve the comprehensive requirements of the McCarran Amendment and to avoid piece-meal adjudication. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976) ("Colorado River"). *Gila River I.* Without including pumpers of underground water sources, who may interfere with the flow of the Gila River, the General Stream Adjudication will not be a "comprehensive" adjudication of all the rights to the Gila River System and Source as contemplated by the Court and Congress.

In *San Carlos*, the Apache Tribes complained to the Court, *inter alia*, that under the McCarran Amendment, 43 U.S.C. § 666, the Arizona stream adjudication would not constitute a comprehensive judicial proceeding, because it failed to include claimants who pump from underground sources which

---

8. *See San Carlos Apache Tribe et al. v. Superior Court of Arizona*, 193 Ariz. 195,189, 972 P.2d 179 (1999).

9. *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 16 (1983).

threatened the streams, springs and underground water sources upon which the Apache Tribes were dependent for present and future uses.

The Court found that the McCarran Amendment reflected "a clear federal policy" of avoiding "piecemeal adjudication of water rights in a river system," and that federal law would protect Indian water rights in state court, and that state court decision could be reviewed by the Court "after final judgment" of the State Court. *San Carlos* at 552,

> State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

Id. at 571.

The Petitioners complain now that the Arizona Supreme Court has ruled that these Petitioners, and others, who pump water from wells which may impact the water rights under Federal law, or surface rights under State law, A.R.S. § 45-141, *et seq.*, must appear and adjudicate their claims to water *inter sese* in the comprehensive stream adjudication.

The Arizona Supreme Court has determined that appropriable water includes certain hydrologically connected underground water sources of river subflow under state law. Petitioners present no federal question as to the definition of subflow presents itself to this Court. Because the Arizona Supreme Court has ruled on this issue, this Court should defer to the decision of Arizona's highest court on issues of state law.

The groundwater pumpers have no reasonable investment backed expectations in pumping groundwater located in the subflow zone as clarified in *Gila River IV*. Petitioners' argument is based on their own interpretation of the meaning of subflow from *Southwest Cotton* while ignoring the warnings of the court in that and other cases. Property rights cannot be created in the minds of individuals. They must be created and recognized by the law. Petitioners are attempting to assert a property right that does not exist. For these reasons, their Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

A. The Court Lacks Jurisdiction.

1. 28 U.S.C. § 1257(a) Does Not Authorize the Jurisdiction of This Court.

a. No State Law is Questioned by the Petition for Writ of Certiorari.

Petitioners allege that this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).[10] The statute specifically states that

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . .

28 U.S.C. § 1257(a).

---

10. *See* Petition, p. 2.

Petitioners allege that the State statutory provision involved in this Petition is Arizona Revised Statutes (A.R.S.) § 45-141.A, which states:

> The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.

However, this State statute is not the subject of the Petition for Writ of Certiorari at all. Petitioners are presenting the question of whether or not a judicial decision can constitute a taking of property. The validity of A.R.S. § 45-141.A. is not being called into question by Petitioners and thus, the Court should not accept jurisdiction on this ground.

2. The Question Presented Is Not Ripe For Adjudication.

A question presented to the United States Supreme Court must be ripe for adjudication. Ripeness insures that the Court will make a reliable decision and avoid "premature adjudication". *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983). "Determination of the scope and constitutionality of legislation [or judicial opinions] in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of judicial function." *International Longshoreman's & Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222 (1954).

Robinson v. Ariyoshi, 753 F.2d 1468, 1471 (9th Cir. 1985) held that a case or controversy existed for the district court to hear regarding the change in Hawaiian property law as announced by the Hawaii Supreme Court in *Robinson v.*

Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977). The Court granted certiorari in the case, vacated the judgment of the Ninth Circuit and remanded the case for further consideration in light of *Williamson County Regional Planning Commission v. Hamilton Bank* (hereafter "*Williamson*"), 473 U.S. 172 (1985). *See Robinson v. Ariyoshi*, 477 U.S. 902, 106 S. Ct. 3269 (1986). *Williamson* held that the takings question regarding various zoning regulations in Tennessee was premature and not ripe for adjudication

> [b]ecause respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property . . . As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations *to the property at issue. Id.* at 186. [Emphasis added].

Although *Williamson* pertains to zoning regulations, this Court in *Robinson v. Ariyoshi*, 477 U.S. 902, utilized *Williamson* to remand the case for further consideration. Thus, even the question of a judicial taking must allege harm to the specific land or well, in question. In the matter now pending before the state court, there is no "particularized" concrete injury as to any of Petitioners' wells at this time.

The Petitioners present no case or controversy that is ripe for adjudication by this Court. While the method of determining subflow is a final judgment of the Arizona Supreme Court, the issue of whether or not the determination of subflow by the Arizona Supreme Court is a taking as to a specific well is not ripe. The next step in the complex Gila River General Stream Adjudication is to determine whether or not wells located in or near the saturated floodplain alluvium are actually pumping

subflow in derogation of the vested property rights of prior appropriators on the Gila River. No final determination has been made by an Arizona court as to whether any well is actually pumping appropriable surface water. Until such time as a determination is made as to the Petitioners' wells, Petitioners cannot allege a "particularized injury" or taking, even assuming that they had a vested property right to groundwater.[11] Phelps Dodge and APS do not allege and cannot show any harm or injury in fact which has been caused by the Arizona Supreme Court's opinion in *Gila River IV*.

Phelps Dodge and APS are seeking an advisory opinion from the United States Supreme Court. The Court should decline discretionary certiorari review in this matter, where further Arizona state court proceedings will present a clean-cut and concrete question after Petitioners' wells have been adjudicated. *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947); and *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981).

3. No Constitutional Takings Question is Presented.

28 U.S.C. § 1257(a) also confers jurisdiction on this Court for matters "where any title, right, privilege, or immunity is specially set up and claimed under the Constitution . . ." Petitioners allege that their property rights to groundwater have been violated in contradiction to the Fifth Amendment to the United States Constitution which prohibits the taking of private property for public use without just compensation.

Petitioners' claim that groundwater is a vested property right is incorrect under the long standing statutory and common law of the State of Arizona, which is incorrect.

11. The issue of a judicial taking is simply not ripe in this case because, as *Williamson* states, "those factors simply cannot be evaluated until the administrative agency [or judiciary] has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *id.* at 191.

See Point C, *infra*. Without a property interest, Petitioners cannot properly allege a taking and this Court should therefore not accept jurisdiction.

4. No Compelling Reason Exists for Granting the Petition for Writ of Certiorari.

Rule 10 of the Rules of the Supreme Court of the United States, allows a Petition for Writ of Certiorari to be granted "only for compelling reasons". Petitioners claim that the Court should grant the Petition because the state court has decided an important question of federal law pursuant to Rule 10(c).[12] The Arizona Supreme Court in *Gila River IV* decided a purely state common law issue regarding the definition of subflow. In order for this Court to decide whether or not a taking has occurred in violation of the Fifth Amendment to the Constitution, this Court would have to overrule the state common law that no vested property right exists to groundwater in Arizona. The Arizona Supreme Court is clear on this issue, however No property right to the potential, future use of groundwater exists in Arizona. *See* Point C, *infra*. Because the Arizona courts have already decided this common law issue, the subsequent ruling in *Gila River IV* that the determination of subflow is not a taking of any purported groundwater property rights was entirely appropriate. Thus, no federal question or compelling justification exists for accepting the Petition for Review.

Petitioners also allege that the Arizona Supreme Court "rejected the Petitioners takings arguments without any analysis of [the United States Supreme Court's] precedents concerning the takings clause of the Fifth Amendment, and it did so in a way that clearly conflicts with those precedents." *See* Petition, p. 10. The Arizona Supreme Court dispensed with an in depth takings analysis because under Arizona common law, " a well owner does not own underground water", *Town of Chino Valley v. City*

12. *See* Petition, p. 10.

of Prescott, 131 Ariz. 78, 82, 638 P.2d 1324, 1328 (1981), and because landowners have 'no legally recognized property right in potential, future groundwater use,' *Gila River I*, 171 Ariz. at 239, 830 P.2d at 451, the constitutional argument is substantively without merit." *Gila River IV* at 344. No reason existed for the Arizona Supreme Court to develop a takings analysis because the crucial element of property for that analysis does not exist.

B. The Previous Decisions of Arizona Courts Regarding Subflow Conform with the Decision of the Arizona Supreme Court *Gila River IV* and Do Not Constitute a Sudden Change in Arizona Law.

In *Southwest Cotton*, the Arizona Supreme Court began to define subflow under the common law of Arizona. "The real question involved [in *Southwest Cotton*] is the law applicable to the relative rights to the ownership and use of the subterranean waters of the state as against those of surface waters." *Id.* at 70. The plaintiffs in *Southwest Cotton* argued that percolating waters were subject to appropriation and that the waters to which they claimed an appropriative right were, "on the contrary, subterranean waters running in channels with well-defined and known banks, and therefore of the class of waters admittedly subject to appropriation under the law of Arizona." *Id.* at 84. The court first held that percolating groundwater, the groundwater which is not part of the natural stream or its subflow, is not appropriable under state law. *Id.* at 79. The court then went on to define subflow. For underground waters to be classified as subflow, according to *Southwest Cotton*, they must meet certain standards. Those standards require that the subsurface waters have "substantially like characteristics with surface water". *Id.* at 86. *See also Howard v. Perrin*, 200 U.S. 71, 26 S. Ct. 195 (1906); *Pima Farms Co. v. Proctor*, 30 Ariz. 96, 245 P. 369.

The characteristics of surface water were discussed in *Southwest Cotton*. Those characteristics are a channel, consisting of a well-defined bed and banks, and a current.[13] Current, according to *Southwest Cotton*, exists where "the water has a natural motion or current" as opposed to a pond or lake with water that is substantially at rest. *Id.* at 87. Therefore, if subsurface water has substantially the same characteristics as a defined bed and banks and current, it is considered subflow and is appropriable in Arizona.

The court in *Southwest Cotton* defined the test for subflow as the subsurface water that is in or immediately adjacent to a surface stream and possesses characteristics substantially similar to that of surface water. *id.* at 100-01. Unfortunately, this test is not very defining at all because the term "immediately adjacent to" is an abstract concept, particularly in light of the discussion in *Southwest Cotton* which provides guidance as to how subflow may be legally proven. The court states that:

> While surface indications such as trees, shrubs, bushes and grasses growing along the course and topographical features of the surface are the simplest and surest methods of proof, we think they are by no means exclusive. Other methods may be used, such as a series of wells or borings, tunnels, the color and character of the water, the sound of the water passing underneath the earth, the interruption of the flowing of other wells on the line of the alleged subterranean stream, geologic formation, and perhaps others.

Id at 87.

The burden of proving whether or not a well is pumping appropriable subflow lies with the asserting party wherein pumping is alleged to interfere with the property rights of surface water appropriators. *Id.* at 85.

---

13. *See* discussion in *Southwest Cotton*, at 87.

Petitioners contend that *Southwest Cotton* clearly defines subflow and that Arizonans have reasonably relied on that holding when drilling and pumping from their wells. Petitioners are incorrect in their assertion. Petitioners and others have only relied on their own interpretation of what *Southwest Cotton* meant to them when drilling their wells and pumping subsurface water. If any doubt is raised at to whether or not *Southwest Cotton* clearly defines the location of subflow once and for all, the warning of the Arizona court in the following conclusion of the case should clarify this understanding.

> Subterranean waters are necessarily more or less uncertain as to their very existence, and frequently incapable of an immediate demonstration of the results of their appropriation of such a nature that investors may safely stake their funds and farmers their future on the success of the project. If percolating waters are subject to the law of prior appropriation, and if appropriations of other subterranean waters may be established by mere surmise, inference or possibility, the field is open to interminable and uncertain litigation from which none will profit in the end but members of the legal profession, and there will in all probability be a complete cessation of extensive development work, due to the impossibility of ascertaining in advance just what rights will be acquired thereby. It may be said that this rule means an end to all future large pumping projects. If these projects are based on the depletion of surface waters, it is far more economical both in money and water, and thus better for the state as a whole, that those surface waters be utilized through surface developments, as they doubtless will be when necessity arises. If, on the other hand, they are based on a use of water which will not affect surface developments, past or future, there are other principles of law, not necessary for the determination

> of this case, which properly applied, will do justice to the state and to its individual citizens alike. While it may be, and doubtless is, true that the effect of the declaration of public policy made by our legislature so long ago will be to lessen somewhat the number and size of future irrigation projects depending upon pumped water, in our opinion it is more than compensated by the establishment of certainty and security for the vastly more important surface water projects now existing, and which will doubtless exist in the future.

Id. at 105.

Although the *Southwest Cotton* court projected that future pumping activities would be reduced by its holding which placed a higher priority on surface water, groundwater pumpers did not heed the court's warning that subflow exists and is subject to prior appropriation.

Over the past 70 years, and particularly since World War II, technological advances have provided the means whereby pumping, even from distant locations can interfere with the surface flow of a stream through an enlarged cone of depression created by the intensive pumping from a well. The more powerful the pump on a well, the larger the cone of depression and the more likely that the pump is reaching into the subflow zone.

The Gila River General Stream Adjudication was initiated to determine the relative rights of all appropriators of surface water on the Gila River. It is alleged in the adjudication that groundwater pumping is causing the depletion of both the surface waters and subflow in the Gila River in derogation of the rights of those parties who have appropriated waters from the Gila River. Before the court in the adjudication could decide whether or not unlawful pumping of subflow is occurring, it was necessary to more clearly define the meaning of subflow

in sound principles of hydrology. *Southwest Cotton's* definition of bed, banks and immediately adjacent to the river, was not enough information to make that definition. Because of advances in geology and hydrology, the Arizona Supreme Court, was able to define subflow in a way that is completely consistent with the definition in *Southwest Cotton*. If the groundwater pumpers had actually heeded the warnings of *Southwest Cotton* and ceased such speculative pumping activities, the holding in *Gila River IV* would clearly have been a win for the groundwater pumpers in that they could now move forward with greater certainty that they were not interfering with property rights to surface waters. They did not heed those warnings. Petitioners now seek to avoid the ultimate adjudication of their interference with prior appropriative property rights to surface water.

Petitioners claim that 38% of the total wells in the San Pedro River Basin are in the trial court's subflow zone. *See* Petition, p. 1. The reason that such a high percentage of these wells are located in this zone is because that is where the water is most available. Pumping subflow is much easier than pumping groundwater. Petitioners are very sophisticated. They had no right to rely on the future availability of water they pumped.

The *Gila River IV* court was careful to follow its own precedent in *Southwest Cotton*.[14] In *Gila River II*, the Arizona Supreme Court held that the trial court had erred "in adopting its 50%/90 day test for determining whether under ground water is 'appropriable' under A.R.S. § 45-141." *Gila II*. at 386. The *Gila River II* court held that lower court erred in using the 50%/90 day test which evaluates whether or not a particular well is pumping subflow if "the volume of stream depletion would reach 50% or more of the total volume pumped during . . . [a] period of withdrawal [that] is equivalent to 90 days of continuous pumping for purposes of technical calculation." *Id.* at 385. The reason for this error, the Arizona Supreme Court

14. *See Southwest Cotton* at 334-7.

stated, is that the 50%/90 day test expanded and changed the holding in *Southwest Cotton* because it "did not distinguish between wells pumping groundwater from tributary aquifers [which are not subject to prior appropriation] and those pumping actual subflow of the river." The 50%/90 day test effectively expanded the definition of subflow that was "broad enough to include all underground water hydraulically connected to a surface stream." In Arizona, in almost all cases, subflow is those waters which are generally "found within, or immediately adjacent to, the bed of the surface stream itself." *Gila River IV* at 335 (quoting *Southwest Cotton* at 97). Tributary subsurface water is not included in the definition of subflow and the 50%/90 day test failed to account for this precedent as defined by *Southwest Cotton.*

The Arizona Supreme Court in *Gila River IV* went on to say that "[w]hether a well is pumping subflow does not turn on whether it depletes a stream by some particular amount in a given period of time. . . . [I]t turns on whether the well is pumping water that is more closely associated with the stream than with the surrounding alluvium." *Gila River IV* at 336 (quoting *Gila River II* at 392). Although the *Southwest Cotton* test asks whether or not "drawing off the subsurface water tend[s] to diminish appreciably and directly the flow of the surface stream. . .", the *Southwest Cotton* court also required that this drawing off be from the subflow zone of the stream only. The *Gila River IV* court finally resolved this requirement by defining the subflow zone using the evidence of several hydrological and geological specialists.[15] The particularized analysis of whether or not pumpers are drawing off subflow from the surface stream is, as stated before, the next step in the adjudication.

The *Gila River IV* test for subflow fits squarely with the precedent set in *Southwest Cotton*. No sudden change in

15. *See Gila River IV* at 336-7 for discussion of extensive testimony involved in the "subflow" determination.

precedent has occurred at all in this litigation and Petitioners have no sufficient reason to challenge the holding as being a change in precedent, let alone a sudden and unpredictable change.

C. The Holding in *Gila River IV* Does Not Destroy Vested Property Rights to Groundwater Because the Potential, Future Use of Groundwater is Not a Vested Property Right Under Arizona Law.

The Arizona court's definition of subflow does not constitute a taking of property rights to present or future pumping of groundwater. Petitioners cannot claim a taking where there is no property right to potential, future use of groundwater and their investments in groundwater pumping are not reasonable investment decisions in light of the holding in *Southwest Cotton*, subsequent Arizona opinions and the Constitution of the State of Arizona.[16]

Petitioners urge the Court to find that the Arizona Supreme Court's decision in *Gila River IV* that "landowners have 'no legally recognized property right in potential, future groundwater use' " constitutes an unconstitutional change in judicial precedent. *See* Petition, App. A33. First, this is a decision of Arizona law by Arizona's highest court. Second, Petitioners are incorrect in their assertion. Groundwater in Arizona, when it is in the ground, is not a property right. "The right of the owner of the land overlying groundwater is simply to the 'usufruct of the water' and that percolating waters are 'like wild animals, free to roam as they please and are the property of no one'." *Cortaro Water Users' Association v.*

16. *See Southwest Cotton; Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953); *Town of Chino Valley v. State Land Dept.*, 119 Ariz. 243, 580 P.2d 704 (1978) ("*Chino Valley I*"); *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P. 2d 1324 (1981) ("*Chino Valley II*"); *Cortaro Water Users' Association v. Steiner*, 148 Ariz. 314, (1986) ("*Steiner*"); The Constitution of the State of Arizona, art. 17, § 1.

Steiner, 148 Ariz. 314, 319, 714 P.2d 807 (1986) (*"Steiner"*) (quoting *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 82, 638 P.2d 1324, 1328 (1981) (*"Chino Valley II"*). "By the Constitution of Arizona art. 17, § 1, effective at statehood in 1912, it was provided that the common law doctrine of riparian water rights 'shall not obtain or be of any force or effect in the State' ". *Chino Valley II* at 1326. "Waters percolating beneath the soil were not included among those subject to appropriation." *Id.*

Arizona has adopted the common law doctrine of reasonable use for underground waters. "Under the doctrine of reasonable use property owners have the right to capture and use the underground water beneath their land for a beneficial purpose on that land * * *". *Chino Valley II* at 1328 (*quoting Chino Valley I* at 248). According to the court in *Chino Valley*, "[t]his statement we think is supported by the better reasoned decisions in this country. In the absolute sense, there can be no ownership in seeping and percolating waters until they are reduced to actual possession and control by the person claiming them because of their migratory character." *id.* at 1328.

Petitioners confuse the fact that water, after it is withdrawn from a well, like a wild animal, becomes property. The right to chase the animal is not property. And the "claim" to groundwater for use before it is captured is not property. *See* Petition, p. 20. In Arizona, groundwater pumpers cannot enjoin another local pumper from pumping groundwater that is free to roam so long as the water is put to a reasonable use, because no property right to the groundwater exists at that point.[17] The Arizona

---

17. *See Bristor* at 179, which quotes the Restatement of Law of Torts, Volume IV, Chapter 41, Topic 4, Page 387, Section 860 which says:

> A possessor of land who, in using the subterranean water therein, intentionally causes a substantial harm to a possessor of other land through invasion of the other's interest in use of subterranean water in his land, is liable to the other if, but only if, the harmful use of water is unreasonable in respect to the other possessor.

Supreme Court in *Gila River I* and *Gila River IV* was correct in its statement that there is "no legally recognized property right in potential future groundwater use." *Gila River IV* at 1083 (quoting *Gila River I* at 451.)

Petitioners quote *Bristor v. Cheatham ("Bristor")*, 75 Ariz. 227, 255 P.2d 173 (1953) in support of their position that potential, future groundwater use is a property right. *See* Petition, p. 21. The Petitioners assert that the doctrine of reasonable use is a rule of property that protects future groundwater use.

Petitioners misguide the Court. *Gila River IV* determines what is appropriable surface water. It does not apply to groundwater, whatever the status may be. However, in *Bristor*, the Arizona Supreme Court held that groundwater users "have no protection except that offered by the common law as enunciated in *Howard v. Perrin*, 8 Ariz. 347, 76 P.2d 460 (1905), and subsequently approved in *Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co.*, supra." *Bristor* at 234. The common law that is referred to in *Bristor* is the reasonable use rule. The doctrine of reasonable use does not create a property right to future groundwater use, nor does it create a right to deplete surface flow. Petitioners failed to disclose to the Court the most critical restriction on the rule.

> . . . but it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with beneficial ownership or enjoyment of the land whence they are taken, if it thereby result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, *or if his wells, springs, or streams are thereby materially diminished in flow* or his land is rendered so arid as to be less valuable for agriculture, pasturage, or other legitimate uses."

Bristor at 237-8 [Emphasis Added].

The court in *Gila River IV*, by ruling that there is no property right to potential, future groundwater use, followed the precedents set in its earlier opinions cited above and the Constitution of the State of Arizona. This affirmation by the Arizona court neither constitutes a sudden and unpredictable change in Arizona common law as Petitioners argue, nor does the holding in *Gila River IV* encroach on any right of groundwater pumpers to pump and use groundwater pursuant to the reasonable use doctrine. The *Gila River IV* holding merely requires those pumpers who are likely pumping subflow that is interfering with the vested rights of a beneficial user of appropriable surface water to appear in the Gila River Adjudication according to the holding in *Bristor* above. Petitioners have no "reasonable" claim in asserting an unrestricted property right to potential future groundwater use that interferes with vested property rights.

Petitioners also argue that the Arizona legislature has created numerous statutory rights to the future use of groundwater. *See* Petition, p. 22. Petitioners are once again incorrect.

The Arizona legislature, in passing the Groundwater Management Act, merely regulated the "race to bedrock" in the use of groundwater in Arizona, particularly in the Active Management Areas ("AMAs"), which are areas where groundwater resources are most threatened. These areas are typically areas of high population concentration. *See* A.R.S. § 45-411, *et seq*. The Act permits the preservation of certain types of groundwater pumping as grand fathered rights, such as for irrigation purposes. *See* A.R.S. § 45-461, *et seq*. These rights allow groundwater pumpers to continue to withdraw groundwater for certain identified uses that have occurred in the past. However, this "grandfathering" of groundwater for certain uses does not guarantee that there will be any water available for them to pump, as Petitioners seem to assert. It merely allows historic types of use to be continued

into the future so long as the groundwater user can capture the "roaming" groundwater below. No property right to the future use of groundwater could be reasonably found from the Groundwater Management Act passed by the Arizona legislature as Petitioners assert. *See* Petition, p. 23. Certainly, no right was created by the legislature for groundwater pumpers to interfere with prior appropriative surface water rights.

Petitioners assert that several other sections of the Groundwater Code create and recognize property rights in the potential future use of groundwater. Petitioners incorrectly assume that a statutory authorization to acquire permits to drill wells, creates a property right to the groundwater that is not yet captured.

The non-property status of groundwater in Arizona has also been affirmed by the Ninth Circuit Court of Appeals in *Cherry v. Steiner*, 716 F.2d 687 (1983) ("*Cherry II*"). Plaintiffs in that case alleged that the enactment of the Arizona Groundwater Management Act of 1980 violated their use and enjoyment of the water beneath their property to which they asserted a property right. The United States District Court for the District of Arizona held that prior decisions of Arizona courts did not establish a proprietary interest in groundwater, and that *Chino Valley II* was not a radical departure from prior law, and thus does not violate property rights. *See Cherry v. Steiner*, 543 F. Supp. at 1277 (1982) ("*Cherry I*"). In affirming the Federal District Court holding, the Ninth Circuit has both affirmed that no property right exists to groundwater in Arizona, both under *Cherry I*, *Cherry II* and *Chino Valley II*.

The Arizona Supreme Court reviewed state law and the history of the depletion of flowing streams and groundwater in Arizona, and determined that State law is inadequate to protect federal rights where those who pump from underground water sources ("subflow") of the Gila River are depleting stream flows that are necessary to fulfill the purposes for which federal

reservations were established. *See Gila III*. In the present case, the Arizona court has defined pumping which interferes with state surface water rights. This Court honors the decisions of the States' highest court when interpreting state law.[18]

Because the right to potential future groundwater use is not guaranteed in Arizona, no property right can exist to that groundwater. The only right groundwater users have to groundwater is the right to attempt to capture that water and put it to some kind of reasonable use. Arizona has a long established system where surface water rights are the most certain property rights through prior appropriation and beneficial use, and are constitutionally protected. Groundwater rights, however, are subject to reasonable use and are not vested property rights. *See Southwest Cotton*. For an Arizona court to hold otherwise, would suddenly and unpredictably change the status of all water rights in Arizona. Petitioners' arguments regarding the status of the future and potential use of groundwater as a property right are without merit. The Court should reject Petitioners' Writ of Certiorari for lack of establishing a property right that could be infringed upon.

D. The Decision in *Gila IV* Does Not Infringe on Any Groundwater Right, It Merely Requires the Adjudication of Appropriable Subflow.

Assuming arguendo that Petitioners do have a right to potential, future groundwater use, they still have no claim under the holding in *Gila River IV*. Petitioners argue that their right to pump groundwater will be precluded by subjecting them to the decision in *Gila River IV*. Groundwater is not the subject of the

18. *Johnson v. Frankell*, 520 U.S. 911, 916, 117 S. Ct. 1800, 1894, 138 L. Ed. 2d 108 (1997); *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S. Ct. 760, 765, 97 L. Ed. 1105 (1953); *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 838, 98 S. Ct. 1535, 1541, 56 L. Ed. 2d 1 (1978); and *Reitman v. Mulkey*, 387 U.S. 369, 378-379, 87 S. Ct. 1627, 1633, 18 L. Ed. 2d 830 (1967).

Gila River Adjudication at all. The Adjudication will determine the relative rights of all owners of property rights to the waters of the Gila River and its sources. The potential and future use of these surface and subflow rights are state property rights in Arizona under the doctrine of prior appropriation and beneficial use.[19] Where groundwater pumpers are interfering with those property rights, the Arizona Courts are permitted to enjoin this activity.[20] The Gila River Adjudication will decide the *inter sese* rights to the Gila River and its sources, not of groundwater. Thus, legally, there could be no taking of groundwater by the Gila River Adjudication court.

---

19. *See San Carlos Apache Tribe, et al. v. Superior Court of Arizona*, 193 Ariz. 195, 205, 972 P. 2d 179 (1999). ("We agree with Judge Bolton's conclusion that the water rights of the parties in the Gila and Little Colorado general stream adjudications are vested substantive property rights.").

20. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030, 112 S. Ct. 2886 (1992). ("The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and . . . it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.").

CONCLUSION

The definition of subflow determined by the *Gila River IV* court concerns appropriable surface water. It does not expand any definition of subflow that existed in the past. It clarifies the definition of subflow. It requires those who pump surface water as "subflow" to participate in the comprehensive stream adjudication. To exclude them is to ignore the Courts' instruction in *San Carlos*.

The Petition for Writ of Certiorari filed by Petitioners Phelps Dodge and APS attempts to complicate and mislead the Court to avoid the consequences of the inter sese adjudication of rights to the Gila River and its sources. This Court should not permit Phelps Dodge and APS to muddy those waters. The Court lacks jurisdiction, and there is no takings question presented.

For the reasons set forth in this Response, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOE P. SPARKS
Counsel of Record
JOHN H. RYLEY
SPARKS, TEHAN & RYLEY, P.C.
Attorneys for Respondents
The San Carlos Apache Tribe,
The Tonto Apache Tribe, and
The Yavapai-Apache Nation
7503 First Street
Scottsdale, Arizona 85251
(480) 949-1339